

**UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**PLANNED BUILDING SERVICES, a
part of PLANNED COMPANIES and
related to PLANNED LIFESTYLE
SERVICES,**

Employer,

and

**LOCAL 32BJ, SERVICE EMPLOYEES
INTERNATIONAL UNION,**

Petitioner,

and

**LOCAL 741, NATIONAL
ASSOCIATION OF SPECIALTY
TRADES UNION, NASTU, formerly
Local 124, R.A.I.S.E.,**

Intervenor.

Case No. 22-RC-228543

**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
ISSUANCE OF A CERTIFICATION OF REPRESENTATIVE AND REQUEST FOR
EXTRAORDINARY RELIEF IN THE FORM OF EXPEDITED CONSIDERATION**

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I. PROCEDURAL HISTORY AND RELEVANT BACKGROUND

On October 3, 2018,¹ Local 32BJ, Service Employees International Union ("Petitioner" or "Local 32BJ"), filed a representation petition with Region 22 of the National Labor Relations Board ("NLRB" or "Board") seeking to represent certain employees of Planned Building Services and Planned Lifestyle Services, both separate divisions operating under Planned Companies (hereinafter collectively referred to as "Employer").² At the time Local 32BJ filed its petition, a collective bargaining agreement ("CBA") was in place between the Employer and Local 741, National Association of Specialty Trades Union ("Intervenor" or "Local 741") covering the petitioned-for unit.

On October 16, the parties participated in a pre-election hearing where the only issue was whether a contract bar existed in this matter blocking the further processing of Local 32BJ's petition. On November 19, the Regional Director of Region 22 issued a Decision and Direction of Election ("DDE") finding no contract bar and, subsequently, an election was held on December 6. Local 32BJ won the election. On December 13, the Employer filed a Request for Review of the Regional Director's DDE and Request for Extraordinary Relief. The Request for Extraordinary Relief asked that the Board stay further Regional Director action, *i.e.*, issuing a Certification of Representative, until such time as the Board considered the Employer's Request for Review of the DDE.³

¹ Hereinafter, all dates refer to 2018 unless noted otherwise.

² Local 32BJ sought to represent housekeeping and front service employees of the Employer employed at Galaxy Towers, a condominium building located at 7000 Kennedy Boulevard East, Guttenberg, New Jersey 07093.

³ The Employer hereby incorporates by reference into this instant Request for Review its December 13 Request for Review of the Regional Director's DDE and Request for Extraordinary Relief (and all arguments made therein for such relief). *See* the Employer's December 13 Request for Review of the Regional Director's DDE and Request for Extraordinary Relief, attached hereto as **Exhibit 1**. This is so despite the fact that the object of the Employer's Request for Extraordinary Relief has already happened. However, for the reasons explained therein and further

On December 13, a few hours after the Employer's filing, Local 741 filed three (3) timely objections to conduct affecting the results of the December 6 election. The practical effect of Local 741's objections was to stay further Regional Director action automatically until such time the objections were investigated and resolved administratively or by way of hearing. Thus, at that point, a stay on further Regional Director action was a certainty (but not due to an affirmative Board ruling on the Employer's Request for Extraordinary Relief).

On January 24, 2019, the Regional Director issued a Partial Decision on Objections, Order Directing Hearing and Notice of Hearing. Specifically, Local 741's Objection No. 2 was set for a hearing scheduled to commence on February 4, 2019.⁴ Then, late afternoon Friday, February 1, 2019, Local 741 requested to withdraw Objection No. 2. As a result, the Employer's Request for Extraordinary Relief, *i.e.*, stay of further Regional Director action such as issuing a Certification of Representative, was once again necessary because there was no longer an objection pending that automatically stayed this RD action.

Consequently, the Employer communicated, via both telephone and email, with Region 22 management and the Executive Secretary's Office that day and the following business day (Monday, February 4, 2019) concerning the Employer's Request for Extraordinary Relief made on December 13. The Employer, in anticipation of a likely short turnaround time on the issuance of a Certification of Representative since no objection was pending, wanted to ensure that its Request for Extraordinary Relief made more than a month-and-a-half prior was given due consideration. Notwithstanding the Employer's pending requests, however, the Regional

below, the Employer respectfully submits that this Regional Director action should not have happened at that time given the unusual circumstances and timeframe surrounding this matter.

⁴ See the Regional Director's January 24, 2019 Partial Decision on Objections, Order Directing Hearing and Notice of Hearing, and his January 25, 2019 Order Rescheduling Hearing, attached hereto as **Exhibit 2**.

Director issued a Certification of Representative for Local 32BJ pursuant to Section 102.67(j) of the Board's Rules and Regulations, Part 102 ("Rule").⁵

The Employer, in accordance with Section 102.67(c) of the Board's Rules, respectfully submits this Request for Review of the Certification of Representative issued by the Regional Director on February 4, 2019. Additionally, the Employer, pursuant to Section 102.67(j)(1)(i) of the Board's Rules, also respectfully submits a Request for Extraordinary Relief in the form of expedited consideration of its request.

As will be further shown below, such relief is necessary under the particular circumstances of this case.

II. STANDARD UPON WHICH TO SEEK BOARD REVIEW OF REGIONAL DIRECTOR ACTION

The Board will grant a party's request for review of Regional Director action only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

⁵ The Regional Director issued his Certification of Representative within the same document as his Order approving withdrawal of objection and cancellation of hearing on objection. *See* the Regional Director's February 4, 2019 Order Approving Withdrawal of Objection and Cancelling Hearing on Objection, and Certification of Representative, attached hereto as **Exhibit 3** (Region accidentally scanned and emailed two copies within the same PDF attachment).

- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Section 102.67(d) of the Board's Rules. Here, it is appropriate for the Board to grant review because there are compelling reasons for reconsideration of an important Board rule under our conditions.

Admittedly, the Regional Director followed the Board's Rules in issuing a Certification of Representative for Local 32BJ. However, the Employer respectfully argues that, given the unusual circumstances and short timeframe at hand, the Regional Director could have – and indeed should have – allowed for a small period of time for the Board to consider the Employer's long-pending Request for Extraordinary Relief.⁶ Notably, it was not as if the Employer was waiting idly by for the Board to rule on its prior request. Rather, Employer's counsel repeatedly attempted to communicate with the Executive Secretary's Office on February 4, 2019 to inform them of this new development and respectfully urge consideration of its pending stay request.

The Region was also fully aware that the Employer's stay request was only then truly necessary due to the objection at hand – which was previously automatically halting further RD action – no longer being pending. Despite this knowledge, the Regional Director issued his February 4, 2019 Certification of Representative for Local 32BJ pursuant to a mechanical

⁶ The Employer does not suggest that the Regional Director should have allowed for an extended, indefinite amount of time for the Board to rule on its Request for Extraordinary Relief. But, the Executive Secretary's Office should have been given meaningful notice of this very recent development and the fact that further RD action was now not being automatically stayed by way of objection. To this end, although it is not a guarantee that the Board's ruling on the Employer's December 13 Request for Extraordinary Relief was affected, *i.e.*, stalled, by the automatic stay caused by Local 741 filing timely objections, it is certainly possible – and likely – that this did happen. As such, providing the Executive Secretary's Office some meaningful opportunity to consider a pending, and now clearly necessary, request for stay should have happened rather than issuing a Certification of Representative practically immediately after Local 741 withdrew its objection.

application of the Board's Rules, regardless of the potentially inefficient results such a decision could produce.

III. COMPELLING REASONS EXISTS FOR THE RECONSIDERATION OF AN IMPORTANT BOARD RULE UNDER OUR PARTICULAR CIRCUMSTANCES

Under Section 3(b) of the Act, a Regional Director may certify a representative despite the fact that a request for review is pending in the matter. See 29 U.S.C. §153(b). Section 102.67(j)(2) of the Board's Rules further states that "[t]he pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the Regional Director will be altered in any fashion."⁷ Notwithstanding this fact, issuing a Certification of Representative in the instant case – especially in light of the Employer's pending requests from December 13, the recent development concerning the withdrawal of objection, and apparent lack of meaningful notice given to the Executive Secretary's Office – was not sound at that time.

Indeed, a couple months before stepping down, former Board Chairman Philip A. Miscimarra ("Miscimarra") specifically inveighed against Regional Directors issuing certifications prior to the Board having an opportunity to rule on requests for review in such cases. In Republic Silver State Disposal, Inc., 365 NLRB No. 145 (2017), former Chairman Miscimarra stated it was "objectionable and ill-advised as a matter of policy for regional directors to issue a certification before the Board has had an opportunity to address issues raised by the parties regarding the election." To this end, former Chairman Miscimarra held that "the Board's primary function of fostering labor-management stability is necessarily frustrated *if*

⁷ Section 102.67(c) of the Board's Rules respectively states, in relevant part, that "the Board may review any action of a Regional Director delegated to him/her under Section 3(b) of the Act." Section 102.69(c)(2) of the Board's Rules also states, a "decision of the Regional Director may include a...certification of representative where appropriate, and shall be final unless a request for review is granted."

union certification precedes the Board's final resolution of election-related issues.” Id.

Emphasis added. In that case, however, the employers did not challenge or attempt “to stay the Regional Director's certification of the union while election-related issues remained unresolved by the Board.” Id.

Conversely, unlike Republic Silver, the Employer here specifically challenged the further processing of Local 32BJ’s election petition under a contract-bar theory and requested a stay of further RD action by way of its December 13 Request for Review of the Regional Director’s DDE and Request for Extraordinary Relief. Significantly, the Regional Director issuing his Certification of Representative to Local 32BJ realizes former Chairman Miscimarra’s fear of frustrating labor-management stability. The Employer may now need to expend time and resources to bargain, upon request, with a union (*i.e.*, Local 32BJ) it believes should not be its employees’ bargaining representative because of its most recent contract with Local 741. This contract bar argument is the sole underlying issue argued in the Employer’s pending Request for Review of the DDE filed on December 13.

Further, at the time of this December 13 filing, the Employer also made a concurrent Request for Extraordinary Relief to stay further RD action because it understood that the Board might not be able to immediately consider its Request for Review of the DDE. The Employer did so because it wanted to avoid a situation where it could possibly have a bargaining obligation towards a new union whose status it was simultaneously challenging (an outcome former Chairman Miscimarra would likely want to avoid as per his opinion articulated in Republic Silver). Then, Local 741 timely filed objections on December 13 causing the same “stay” result the Employer was seeking. Thus, the Board did not need to consider, at least at that time, the Employer’s Request for Extraordinary Relief.

All of this, however, changed in an instant upon Local 741's eleventh hour withdrawal of Objection No. 2, triggering the short timeframe afforded to Regional Directors for issuing a Certification of Representative under the Board's Rules.⁸ Subsequently, the Employer did all it could under such tight time constraints but, unfortunately, the Regional Director's technical application of the Board's Rules under our unique circumstance trumped any practical and real-world consideration.

Such an outcome is not conducive to a stable labor-management relationship as described by former Chairman Miscimarra in Republic Silver and could actually prove to be an unnecessary endeavor. This would be so if the Board agreed with the Employer's contract-bar argument in its Request for Review of the DDE and reversed the Regional Director, resulting in Local 32BJ not representing the employees at issue (and thus no longer being an interested or relevant party). Hence, a waste of time, money and resources on both sides – the Employer and Local 32BJ – was definitively avoidable if further RD action was stayed until such time that the Board considered the Employer's Request for Review of the DDE.⁹

Nevertheless, the Regional Director issued a Certification of Representative for Local 32BJ on February 4, 2019 pursuant to Section 102.67(j)(2) of the Board's Rules despite the

⁸ The Region did not confirm until early evening (6:13 PM) on Friday, February 1, 2019 that the objections hearing was cancelled. Then, only a few hours into the next business day (2:59 PM), *i.e.*, Monday, February 4, 2019, the Regional Director issued his Certification of Representative. Notably, the Regional Director took this action despite knowing the Employer's Request for Review of his DDE and Request for Extraordinary Relief were still pending (and the fact that the Employer's request for a stay of further RD action was no longer automatically in place by way of Local 741's withdrawal of its objection).

⁹ Alternatively, at the very least, stayed until such time that the Executive Secretary's Office be given meaningful notice of the recent developments in this matter.

actual realities present in the instant case. The Employer respectfully disagrees with this course of action.¹⁰


IV. CONCLUSION

For the reasons set forth above, the Employer respectfully submits its Request for Review of the Regional Director's Certification of Representative be granted and, further, respectfully requests that this request for review be given expedited consideration to avoid the potential unstable and uneconomical outcomes it could produce.¹¹

Respectfully Submitted,

Dated: February 5, 2019

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¹⁰ It should be noted that the Employer is only arguing for a stay of this specific Regional Director action, *i.e.*, issuing a Certification of Representative, under our unique circumstances because a mechanical application of Section 102.67(j)(2) of the Board's Rules was ill-advised.

¹¹ Under Section 102.67(j)(2) of the Board's Rules, "[extraordinary r]elief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case."

CERTIFICATE OF SERVICE

In accordance with Sections 102.5 and 102.67(i)(2) of the Board's Rules and Regulations, the undersigned hereby certifies that a signed PDF original copy of the **EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S ISSUANCE OF A CERTIFICATION OF REPRESENTATIVE AND REQUEST FOR EXTRAORDINARY RELIEF IN THE FORM OF EXPEDITED CONSIDERATION** was electronically filed with the National Labor Relations Board on February 5, 2019.

The undersigned further certifies that the Employer's Request for Review and Request for Extraordinary Relief was emailed to the following on this 5th day of February 2019.

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